

Baker & Hostetler LLP  
45 Rockefeller Plaza  
New York, New York 10111  
Telephone: (212) 589-4200  
Facsimile: (212) 589-4201  
David J. Sheehan  
Email: [dsheehan@bakerlaw.com](mailto:dsheehan@bakerlaw.com)  
Jorian L. Rose  
Email: [jrose@bakerlaw.com](mailto:jrose@bakerlaw.com)  
Seanna R. Brown  
Email: [sbrown@bakerlaw.com](mailto:sbrown@bakerlaw.com)  
Bik Cheema  
Email: [bcheema@bakerlaw.com](mailto:bcheema@bakerlaw.com)

*Attorneys for Irving H. Picard, Esq.,  
Trustee for the consolidated SIPA Liquidation of  
Bernard L. Madoff Investment Securities LLC  
and Bernard L. Madoff*

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

Adv. Pro. No. 08-1789 (BRL)

SIPA Liquidation

(Substantively Consolidated)

In re:

BERNARD L. MADOFF,

Debtor.

**TRUSTEE'S COUNTER-DESIGNATION OF ADDITIONAL ITEMS TO BE INCLUDED  
IN THE RECORD ON APPEAL AND COUNTER-STATEMENT OF THE ISSUES TO  
BE PRESENTED ON APPEAL**

Pursuant to Rule 8006 of the Federal Rules of Bankruptcy Procedure, Appellee Irving H. Picard (“Trustee”), trustee for the substantively consolidated liquidation of Bernard L. Madoff Investment Securities LLC (“BLMIS”) under the Securities Investor Protection Act, 15 U.S.C. § 78aaa *et seq.*, and the estate of Bernard Madoff individually, hereby submits the following counter-designation of additional items to be included in the record on appeal (the “Counter-Designation”) and counter-statement of the issues to be presented on appeal (the “Counter-Statement”) in connection with the appeal by Appellants Martin M., Richard and Steven Surabian (collectively, the “Appellants”) from the Order Denying Motion to Remove Irving H. Picard as Trustee for Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff, entered on November 14, 2012, by the United States Bankruptcy Court for the Southern District of New York (Lifland, J) (ECF No. 5080), and respectfully submits as follows:

**COUNTER-DESIGNATION OF ADDITIONAL ITEMS TO BE INCLUDED  
IN THE RECORD ON APPEAL**

The Trustee hereby counter-designates the following items filed in the main bankruptcy proceeding except where otherwise noted below, captioned *Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities LLC*, No. 08-1789 (BRL) (Bankr. S.D.N.Y.) to be included in the record on appeal:<sup>1</sup>

	<b><u>ECF No.</u></b>	<b><u>Description</u></b>
1.	1209	Opposition to trustee’s determination of claim filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered on January 6, 2010.
2.	2133	Objection to motion of trustee for an order to schedule hearing on “Customer” issue filed by Steven Surabian, Richard Surabian, Martin M. Surabian, entered on April 5, 2010.

---

<sup>1</sup> This counter-designation includes items that may already have been included in Appellants’ designation. However, because ECF No.’s were not uniformly provided by Appellants’, in an abundance of caution, such items have also been included herein.

	<u>ECF No.</u>	<u>Description</u>
3.	2205	Order signed on 4/13/2010 regarding Trustee's Motion For an Order To Schedule Hearing on "Customer" Issue, entered April 13, 2010.
4.	3641	Objection to Motion for entry of an Order Pursuant to Section 105(a) of the Bankruptcy Code and Rules 2002 and 9019 of the Federal Rules of Bankruptcy Procedure Approving an Agreement by and between the Trustee and The Picower BLMIS Account Holders and Enjoining Certain Claims Re: Claim Nos. 001895, 001897, 001949, 001896, 002185, 002186, 001802 and 003367 filed by Th[e] Surabians, entered January 7, 2011.
5.	4732	Motion to Expunge Claims / Trustee's Third Omnibus Motion to Expunge Claims and Objections filed by David J. Sheehan on behalf of Irving H. Picard, entered on March 16, 2012.
6.	53 (Adv. Pro. No. 10-05208)	Opposition to Motion for Entry Approving a Settlement Agreement By and Between the Trustee and Trotanoy Investment Company, LTD filed by Steven Surabian, Richard Surabian, Martin M. Surabian, entered on April 5, 2012.
7.	4779	Order signed on 4/19/2012 Granting Trustee's Third Omnibus Motion Seeking to Expunge Claims and Objections of Claimants that did not Invest With BLMIS or in Entities that Invested in BLMIS, entered on April 19, 2012.
8.	4796	Transcript regarding Hearing Held on 04/19/2012 10:01AM regarding Trustee's First Omnibus Motion Seeking to Expunge Objections by Parties That Did Not File Claims; Trustee's Third Omnibus Motion to Expunge Claims and Objections; Trustee's Second Omnibus Motion Seeking to Expunge Objections by Parties That Did Not File Claims, entered on April 27, 2012.
9.	55 (Adv. Pro. No. 10-05208)	Response / Trustee's Response to Objection of Steven Surabian, Richard Surabian and Martin M. Surabian to Approval of a Settlement Between the Trustee and Trotanoy Investment Company Ltd. filed by David J. Sheehan on behalf of Irving H. Picard, entered on April 30, 2012.
10.	63 (Adv. Pro. No. 10-05208)	Objection to Trustee's Response to Objection of Steven Surabian, Richard Surabian and Martin M. Surabian to Approval of a Settlement Between the Trustee and Trotanoy Investment Company Ltd. filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered June 15, 2012.
11.	4920	Notice of Motion to Set Hearing / Motion for Order Scheduling Hearing on Trustee's Motion Affirming Denial of Time-Based Damages Adjustment to Customer Claims filed by David J. Sheehan on behalf of Irving H. Picard, entered on July 17, 2012.

	<u>ECF No.</u>	<u>Description</u>
12.	4930	Motion to Approve / Motion for An Order Approving Second Allocation of Property to the Fund of Customer Property and Authorizing Second Interim Distribution to Customers filed by David J. Sheehan on behalf of Irving H. Picard, entered on July 26, 2012.
13.	4952	Objection to Motion for Order Scheduling Hearing on Trustee's Motion Affirming Denial of Time-Based Damages Adjustment to Customer Claims filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered on August 1, 2012.
14.	4965	Objection to Motion Authorizing Second Interim Distribution to Customers filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered on August 8, 2012.
15.	4984	Reply to Motion / Trustee's Reply to Objections to Trustee's Motion for an Order Approving Second Allocation of Property to the Fund of Customer Property and Authorizing Second Interim Distribution to Customers filed by David J. Sheehan on behalf of Irving H. Picard, entered on August 15, 2012.
16.	4997	Order Signed on 8/22/2012 Approving a Second Allocation of Property to the Fund of Customer Property and Authorizing Second Interim Distribution to Customers, entered on August 22, 2012.
17.	5001	Response / Trustee's Reply to Objections to Trustee's Motion for an Order to Schedule Hearing on Time-Based Damages Issue filed by Jorian L. Rose on behalf of Irving H. Picard, entered on August 24, 2012.
18.	5003	Motion to Remove Trustee Irving H. Picard As Trustee For The Substantively Consolidated SIPA Liquidation Of Bernard L. Madoff Investment Securities LLC And Bernard L. Madoff filed by Richard Surabian, Steven Surabian, entered on August 27, 2012.
19.	5014	Transcript regarding Hearing Held on 8/22/2012 10:32AM Regarding Motion [on] an Order Approving Second Allocation of Property to the Fund of Customer Property and Authorizing Second Interim Distribution to Customers, entered on August 31, 2012.
20.	5019	Objection to Motion / Trustee's Objection to Motion to Remove Irving H. Picard as Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff filed by David J. Sheehan on behalf of Irving H. Picard, entered on September 4, 2012.

	<u>ECF No.</u>	<u>Description</u>
21.	5022	Scheduling Order signed on 9/5/2012, entered on September 5, 2012.
22.	5024	Transcript regarding Hearing Held on 09/05/2012 10:04AM Regarding Motion for Order Scheduling Hearing on Trustee's Motion Affirming Denial of Time-Based Damages Adjustment to Customer Claims, entered on September 11, 2012.
23.	5028	Response / Reply to Trustee's Objection to Motion to Remove Irving H. Picard as Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff filed by Richard Surabian, Steven Surabian, entered on September 13, 2012.
24.	5031	Notice of Appeal filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered on September 20, 2012.
25.	5066	Trustee's Interim Report / Trustee's Eighth Interim Report for the Period Ending September 30, 2012 filed by Irving H. Picard on behalf of Irving H. Picard, entered on November 5, 2012.
26.	5080	Order Signed on 11/14/2012 Denying Motion to Remove Irving H. Picard for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff, entered November 14, 2012.

**COUNTER-STATEMENT OF THE ISSUES TO BE PRESENTED ON APPEAL**

The Trustee hereby submits the following counter-statement of the issues on appeal:<sup>2</sup>

1. Whether the Bankruptcy Court's denial of the motion for an order to remove Irving H. Picard, as Trustee for Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff, entered on November 14, 2012, was clearly erroneous or an abuse of the Bankruptcy Court's discretion.
2. Whether the Bankruptcy Court erred in holding that the Surabians did not show cause for the extreme remedy of removing the Trustee where they failed to set forth

---

<sup>2</sup> Several issues raised, and documents cited, by the Appellants in their Statement of Issues and Designation of the Contents of the Record on Appeal (ECF No. 5154) relate to the appeal of the Second Interim Distribution Order, dated August 22, 2012 (ECF No. 4997). The appeal of the Second Interim Distribution Order is currently pending in the District Court (Civ No. 12-7999) (Judge Katherine Forrest). The Trustee has filed a motion to dismiss that appeal which is currently pending in that appellate court. The issues and documents relating to the Second Interim Distribution Order were inappropriately combined by the Surabians and are not properly before this court in the instant appeal.

specific facts or legal basis in support thereof, either in their papers or at the hearing, and made only unsupported, conclusory allegations of prejudice on the part of the Trustee.

3. Whether the Bankruptcy Court erred in denying the motion for an order to remove Irving H. Picard, as Trustee for Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff, where the Appellants have no standing.

4. Whether a district court has jurisdiction to hear an untimely appeal of the Bankruptcy Court's decision.

Dated: New York, New York  
January 2, 2013

Respectfully submitted,

s/ David J. Sheehan

Baker & Hostetler LLP

45 Rockefeller Plaza

New York, New York 10111

Telephone: (212) 589-4200

Facsimile: (212) 589-4201

David J. Sheehan

Email: [dsheehan@bakerlaw.com](mailto:dsheehan@bakerlaw.com)

Jorian L. Rose

Email: [jrose@bakerlaw.com](mailto:jrose@bakerlaw.com)

Seanna R. Brown

Email: [sbrown@bakerlaw.com](mailto:sbrown@bakerlaw.com)

Bik Cheema

Email: [bcheema@bakerlaw.com](mailto:bcheema@bakerlaw.com)

*Attorneys for Irving H. Picard, Esq.  
Trustee for the Consolidated SIPA Liquidation of  
Bernard L. Madoff Investment Securities LLC,  
and Bernard Madoff*